

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DATE FILED: 11/15/2019

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EMA FINANCIAL, LLC,

Plaintiff,

-against-

5BARZ INTERNATIONAL, INC.; 5BARZ AG;
CELLYNX GROUP, INC.; 5BARZ INDIA
PRIVATE LIMITED; and 5BARZ
INTERNATIONAL SA DE CV;

Defendants.
-----X

18-CV-4995 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on September 18, 2019, the Court granted Plaintiff's motion for summary judgment against 5BARZ International Inc. on Plaintiff's claim for breach of the settlement agreement, the Court denied Plaintiff's motion for summary judgment against 5BARZ AG, Cellynx Group, Inc., 5BARZ India Private Limited, and 5BARZ International SA DE CV ("Subsidiary Defendants," together with 5BARZ International Inc., "Defendants"), and the Court denied Defendants' motion for leave to file an amended answer, Dkt. 54;

WHEREAS Defendants opposed summary judgment, but did not respond to Plaintiff's argument that Subsidiary Defendants are jointly and severally liable for 5BARZ International Inc.'s breach of the settlement agreement, *id.* at 7;

WHEREAS "Plaintiff made this argument prominently in its opening brief," *id.*;

WHEREAS the Court, indicating that it was "inclined to grant summary judgment to the Subsidiary Defendants on Plaintiff's claim for breach of the settlement agreement," ordered Plaintiff to submit a brief by October 11, 2019, showing cause why summary judgment should

not be granted in favor of Subsidiary Defendants on this claim pursuant to Federal Rule Civil Procedure 56(f)(1), *id.* at 9, 23;

WHEREAS the Court ordered Subsidiary Defendants to respond to Plaintiff's brief showing cause by November 1, 2019, *id.* at 23;

WHEREAS Plaintiff submitted a brief showing cause on October 11, 2019, Dkt. 58;

WHEREAS Subsidiary Defendants did not respond to Plaintiff's brief;

WHEREAS on November 6, 2019, the Court again ordered Subsidiary Defendants to respond to Plaintiff's brief by November 13, 2019, or the Court would grant Plaintiff summary judgment against Subsidiary Defendants, Dkt. 63;

WHEREAS Subsidiary Defendants again did not respond;

WHEREAS "if a counseled party makes a partial response to a motion for summary judgment, that response 'generally, but perhaps not always, . . . reflects a decision by that party's attorney to pursue some claims or defenses and to abandon others.'" *Netherlands Ins. Co. v. Selective Ins. Co. of Am.*, No. 14-CV-7132, 2016 WL 866348, at *7 (S.D.N.Y. Mar. 3, 2016) (quoting *Jackson v. Fed. Exp.*, 766 F.3d 189, 196 (2d Cir. 2014));

WHEREAS Subsidiary Defendants are represented by competent counsel;

WHEREAS Subsidiary Defendants have abandoned any argument that they are not jointly and severally liable on Plaintiff's claim for breach of the settlement agreement;

WHEREAS the Court also granted Plaintiff attorneys' fees and expenses of \$21,173.20, but withheld ordering payment in anticipation of a motion for additional fees, Dkt. 54 at 23;

WHEREAS Plaintiff has submitted a motion for additional attorneys' fees and expenses of \$11,100.00, Dkts. 60-61;

WHEREAS the Court has reviewed counsel's time records and, with the exception of entries on October 10, 2019, and November 4, 2019, found them reasonable;¹ and

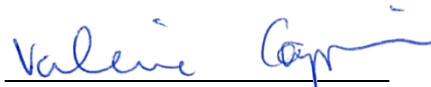
WHEREAS the Court also granted Plaintiff's request for prejudgment interest, calculated at an agreed-upon default rate of twenty-four percent per annum beginning on September 2, 2016, until the date of final judgment, Dkt. 54 at 15–16;

IT IS HEREBY ORDERED that summary judgment on Plaintiff's claim for breach of the settlement agreement is also granted in favor of Plaintiff against Subsidiary Defendants. The Court awards Plaintiff \$95,756.14 in damages, \$94,953.20 in prejudgment interest, and \$30,960.70 in attorneys' fees and expenses, to be entered against all Defendants.

The Clerk of Court is respectfully directed to enter final judgment, close all open motions, and close this case.

SO ORDERED.

Date: November 15, 2019
New York, New York


VALERIE CAPRONI
United States District Judge

¹ On October 10, 2019, a time keeper identified as "Gary Heller" billed 1.5 hours to this matter for a total of \$562.50. Mr. Heller is unknown to the Court. He has not been identified by Plaintiff's counsel in his submission and he has not filed a notice of appearance in this matter. On November 4, 2019, Mr. Fleischmann has two entries for a total of 3 hours (\$1125) for preparing a letter to the Court seeking default and for preparing the motion for attorneys' fees. Because Mr. Heller is unknown to the Court, and because spending three hours on the letter and motion for attorneys' fees was not reasonable, the Court will reduce those charges to \$375.